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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 154

ALEXANDER AKERMAN, PETITIONER

v.

THE UNITED STATES

No. 155

GEORGE M. BOURQUIN, PETITIONER

v.

THE UNITED STATES

*ON PETITIONS FOR WRITS OF CERTIORARI
TO THE COURT OF CLAIMS*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (A. R. 6-12; B. R. 3-10)¹ has not yet been reported.

¹ The record in Judge Akerman's case, No. 154, is referred to as "A. R."; that in Judge Bourquin's case, No. 155, as "B. R."

JURISDICTION

The judgments of the Court of Claims were entered on June 2, 1947 (A. R. 13; B. R. 10). The petitions for writs of certiorari were filed on June 26, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether petitioners, who had retired as United States District Judges prior to July 31, 1946, are entitled to be paid at the rate of \$15,000 per year, as provided by the Act of July 31, 1946, for "each of the judges of the several district courts" when the judges' retirement act provides for payment to a retired judge of "the salary of which he is * * * in receipt" at the time of retirement, and when the salary received at that time was \$10,000 a year.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in Appendix A, *infra*, pp. 16-21.

STATEMENT

Both cases involve the same question, and were heard and decided together by the Court of Claims on demurrers to the petitions.

The petitioner Akerman alleged that on February 15, 1929, after having been appointed by the President of the United States and confirmed by the Senate, he was duly commissioned as United

States District Judge for the Southern District of Florida (A. R. 1). He thereupon entered into the discharge of the duties of such District Judge and continued to perform these duties until October 1939 (A. R. 1). At that time, having attained the age of seventy years, he elected to retire from regular active service on the bench, pursuant to the provisions of Section 260 of the Judicial Code, 28 U. S. C. 375, Appendix A, *infra*, pp. 20-21 (A. R. 1). At the time of his retirement, petitioner was in receipt of an annual salary of \$10,000 (A. R. 4). Subsequent both to his retirement and to July 31, 1946, he has actively served on the bench on numerous occasions and in various districts. Accordingly, the petitioner Akerman, claiming that he was a "judge" within the meaning of the Act of July 31, 1946, Appendix A, *infra*, pp. 16-17, by which Congress had increased the compensation to be paid to "each of the judges of the several district courts" from \$10,000 to \$15,000 per year, sought judgment in the amount of \$3,333.32, less lawful withholding tax, which is the additional compensation allegedly due him from August 1, 1946, to March 1, 1947, under that Act.

The petitioner Bourquin alleged that in March 1912, when he was 49 years of age, he was duly appointed to and installed in the office of United States District Judge in and for the District of Montana (B. R. 1); that in May 1934, he elected to retire under the provisions of the Act of February 25, 1919 (28 U. S. C. 375), and duly

notified the defendant thereof (B. R. 1); that since March 1912, he has been and now is in occupancy of the office of Judge of the United States District Court in and for the District of Montana (B. R. 1); that prior to and on July 31, 1946, all district judges were in receipt of salary provided by law at the rate of \$10,000 per year (B. R. 1); that on July 31, 1946, a statute was enacted which provides that thereafter there shall be paid to each of the judges of the several district courts a salary at the rate of \$15,000 per year in lieu of the salary then paid (B. R. 1-2); that the defendant has refused to pay him the increase in salary so provided, despite his protests and demands (B. R. 2); and that there is due and owing to him, from August 1946 to March 1947, inclusive, the amount of \$2,916 (B. R. 2).

The Court of Claims sustained the demurrers and dismissed the petitions (A. R. 13; B. R. 10), holding that the Act of 1946 did not operate to increase the salaries paid to judges who had retired or resigned (A. R. 6-10; B. R. 3-7). Judge Madden dissented (A. R. 10-12; B. R. 7-10).

ARGUMENT

Petitioners' contentions that they are entitled to be compensated in accordance with the Act of July 31, 1946, Appendix A, *infra*, pp. 16-17, are based primarily on the decision of this Court in *Booth v. United States*, 291 U. S. 339. There Congress had attempted as a part of a general economy

program, to apply a 15 per cent reduction to the salaries of retired judges. This Court held that judges who had retired nevertheless continued in office and were judges within the meaning of Section 1 of Article III of the Constitution forbidding the diminution of the compensation of judges during their continuance in office, and that the Act there considered could not constitutionally be applied to them. Claiming a conflict with this decision, petitioner argues that the Act of July 31, increasing the salaries paid "to each of the judges of the several district courts" plainly and unambiguously includes retired district judges and that therefore the court below erred in resorting to aids of interpretation (A. Pet. 6-7; B. Pet. 13-16). In any event, petitioners contend that the court below improperly relied upon the House Committee Report on a House bill (H. Rep. 1162, 79th Cong., 1st sess., on H. R. 2181), which was an identical companion bill to S. 920 which became the Act of July 31, 1946 (A. Pet. 7; B. Pet. 14-15). We submit that these contentions lack substance and that the court below properly dismissed petitioners' complaints.

1. The holding of the Court of Claims that retired district judges are not entitled to the increased compensation under the Act of July 31, 1946, is not in conflict with the *Booth* case. That case was concerned only with the constitutional prohibition against the diminution of judges' salaries during their continuance in office,

and held that a judge who had retired had not thereby relinquished his office and remained a "judge" protected by that constitutional provision. There is no constitutional question of diminution involved in the present case (cf. *O'Malley v. Woodrough*, 307 U. S. 277), since Congress in the 1946 Act increased, rather than attempted to decrease, the salaries of judges.² Petitioners do not contend that Congress could not increase the salaries paid active judges without simultaneously increasing the compensation of retired judges. The narrow question here presented therefore, is whether Congress in increasing the salaries to be paid to active judges by the 1946 Act intended at the same time to increase the salaries paid to retired judges. This is purely a question of statutory construction, to be resolved from the language of the Act itself, and, to the extent that the language is unclear, from the nature and purpose of the Act as manifested by the relevant legislative materials.

2. Looking only to the language of the 1946 Act, we believe that it shows on its face that the provision here involved was intended to amend Section 2 of the Judicial Code only and not Section 260, and therefore did not operate to increase the salaries of retired judges. Section 2 provides for the salary to be paid to "each of the district judges" and prior to the 1946 Act fixed

² Judge Bourquin states (B. Pet. 17) that "Congress has no power over a judge's salary but to increase it."

that salary at the specific amount of \$10,000; Section 260, on the other hand, sets no specific amount as the salary of a retired judge, and merely provides that he is to receive as compensation "the salary of which he is * * * in receipt" at the time of his retirement. The Act of July 31, 1946, provides that the specific amount of \$15,000 is to be paid as salary to "each of the judges of the several district courts." Thus the Act of July 31, 1946, follows Section 2 in setting a specific salary and enumerating the judges covered. As Section 260 is totally dissimilar, this parallelism between the 1946 Act and Section 2 plainly demonstrates that the clause of the 1946 Act here involved was intended to amend only Section 2, and not Section 260. If the Act on its face means anything, we think it has the meaning ascribed to it by the Court of Claims rather than the meaning for which petitioners contend.

3. But that very conflict between the parties as to the purport and effect of the statutory language serves to undermine the further contention of petitioners that the 1946 Act is so plain and unambiguous as to preclude resort to legislative materials. Cf. *United States v. Dickerson*, 310 U. S. 554, 562.

(a) An examination of the various statutory provisions dealing with federal judges reveals that Congress has not always used the term "judge" to include retired judges, and that to construe the term "judge" always to include retired judges

will frequently lead to results at variance with accepted fact. Thus, Section 215 of the Judicial Code, 28 U. S. C. 321, Appendix A, *infra*, p. 19, fixes the number of Justices of this Court at nine, a Chief Justice and eight Associate Justices. That this includes only the active Justices and not those who have retired has been accepted without question, basically because the President is authorized upon the retirement of a Justice of this Court to appoint his "successor." 28 U. S. C. 375a, Appendix A, *infra*, p. 21. This authority to appoint the successor to a Justice who has retired makes it plain that it was not intended that a retired Justice be considered a "Justice" within the meaning of Section 215.

Similarly, the number of judges in each of the various circuit courts of appeals and in each of the various district courts is specifically provided for in Sections 1 and 118 of the Judicial Code, 28 U. S. C. 1, 213, Appendix A, *infra*, pp. 18-19. In the Southern District of Florida, to which the petitioner Akerman was appointed and from which he retired (A. R. 1), the appointment of three district judges is authorized. Jud. Code § 1, 28 U. S. C. 1. Two district judges are authorized for the District of Montana, where the petitioner Bourquin was appointed and from which he in turn retired. *Ibid.* Yet by Section 260 of the Judicial Code, 28 U. S. C. 375, Appendix A, *infra*, pp. 20-21, the President is also authorized to appoint the successor to a retired judge immedi-

ately upon his retirement, but is not permitted thereafter to fill the vacancy created if the retired judge should die after the appointment of his successor. Obviously, for the purpose of these provisions, a retired judge is not a "judge" as the term is used in Sections 1 and 118 of the Judicial Code.

(b) There is an additional indication that Congress did not regard a retired judge in the same category as other judges. A retired judge may have his residence wherever he pleases (Act of February 11, 1938, c. 23, 52 Stat. 28; 28 U. S. C. 402, Appendix A, *infra*, p. 18), whereas every district judge is required to reside in the district or one of the districts for which he is appointed (Section 1 of the Judicial Code, 28 U. S. C. 1). Similarly, a Justice of this Court is expressly authorized to sit, other than on the Supreme Court, only as a judge of the circuit court of appeals of his circuit (Judicial Code, Sec. 120, 28 U. S. C. 216, Appendix A, *infra*, p. 19). But a retired Justice is authorized to perform any judicial duties in any judicial circuit, including the duties of a district judge (28 U. S. C. 375a; 28 U. S. C., Supp. V, 375f).³

³ Thus the late Mr. Justice Van Devanter, after his retirement, sat as a district judge for the trial of criminal cases. See *United States v. Moore*, 101 F. 2d 56 (C. C. A. 2), certiorari denied, 306 U. S. 664; *United States v. Graham*, 102 F. 2d 436 (C. C. A. 2), certiorari denied, 307 U. S. 643. But other Justices of this Court who have sat on circuit in recent years sat as circuit justices, either as a member of the circuit

(c) Finally, as we have already pointed out above, pp. 6-7, the salaries of retired judges are fixed in Section 260 of the Judicial Code (28 U. S. C. 375), which is separate and distinct from the statute fixing the salaries of other judges (Section 2 of the Judicial Code, 28 U. S. C. 5, Appendix A, *infra*, pp. 18-19).

4. The decision below is further supported by the consistent administrative and legislative construction of the last previous enactment which authorized increased pay for members of the federal judiciary. This was the Act of December 13, 1926, c. 6, 44 Stat. 919, Appendix A, *infra*, pp. 16-17, which increased the salaries of district judges from \$7,500 to \$10,000, and which except for the differences in amounts is virtually identical with the Act of July 31, 1946.

(a) It was the consistent practice of the Department of Justice, which until 1939 was charged with the administration of all matters pertaining

court of appeals on the hearing of an appeal (*Wire Wheel Corp. v. Budd Wheel Co.*, 288 Fed. 308 (C. C. A. 4) (Taft, C. J.); *United States v. Manton*, 107 F. 2d 834 (C. C. A. 2), certiorari denied, 309 U. S. 664 (Stone, J.); *Baker v. Commissioner of Internal Revenue*, 149 F. 2d 342 (C. C. A. 4) (Stone, C. J.)), or as a member of the circuit court of appeals in connection with an application for bail (*United States v. Motlow*, 10 F. 2d 657 (C. C. A. 7) (Butler, J)), or as the senior member of a district court of three judges convened pursuant to Jud. Code § 266 (*Lindsey v. Allen*, 269 Fed. 656 (D. Mass.) (Holmes, J.); *Pearl Assurance Co. v. Harrington*, 38 F. Supp. 411 (D. Mass.), affirmed, 313 U. S. 549 (Frankfurter, J.)).

to judicial salaries,⁴ to pay to judges who had retired prior to December 13, 1926, only \$7,500 per annum, and not \$10,000—although the latter was the figure to which the salary of “each of the district judges” was increased by the 1926 Act.⁵ The attached correspondence between Circuit Judge Denison of the Sixth Circuit and Assistant Attorney General Marshall, in regard to submitting a supplemental budget estimate for an increase in salaries for retired judges, shows that it was understood in 1927 that the 1926 Act did not increase the salaries of such judges and that additional legislation would be necessary to bring the salaries of the retired judges up to the recently raised level of the active judges (Appendix B, *infra*, pp. 22-26).

(b) This consistent administrative practice was reflected in the language of the various appropriation acts making money available for the payment of judges' salaries under the 1926 Act, which obviously contemplated that the salaries paid retired judges were not necessarily the same as those paid active judges. These Acts typically provided money for a specified number of circuit judges at \$12,500, for a specified number of dis-

⁴ See Sections 5 and 6 of the Act of August 7, 1939, c. 501, 53 Stat. 1223, 1226, transferring these functions to the Administrative Office of United States Courts.

⁵ It appears that by the time the Administrative Office of United States Courts took over the payment of judges' salaries, all of the judges who had retired prior to the Act of December 13, 1926, had died.

trict judges at \$10,000, and for the salaries of "judges retired under section 260 of the Judicial Code, as amended by the Act of February 25, 1919 (U. S. C., p. 908, sec. 375)." E. g., 45 Stat. 79; 45 Stat. 1110; 46 Stat. 188; 46 Stat. 1323-1324; 47 Stat. 490. In none of these Acts was any mention made of the 1926 Act as amending Section 260.

It follows that Congress, by following so closely in the 1946 Act the form and language of the 1926 Act, must be taken to have adopted the consistent administrative and legislative interpretation of the earlier measure. Cf. *National Lead Co. v. United States*, 252 U. S. 140, 146-147; *Murphy Oil Co. v. Burnet*, 287 U. S. 299, 302-303. The necessary consequence is that the 1946 Act did not increase the salaries of the retired judges.

5. An examination of the legislative history of the 1946 Act itself necessarily requires the same conclusion.

(a) S. 920, 79th Cong., which became the Act of July 31, 1946, was introduced in the Senate on April 24, 1945 (91 Cong. Rec. 3707). It was favorably reported on June 28, 1946 (92 Cong. Rec. 7784; see S. Rep. 1631, 79th Cong., 2d sess.). S. 920 as introduced was identical with H. R. 2181, which had been earlier introduced (February 14, 1945; 91 Cong. Rec. 1107) and earlier reported (October 29, 1945; 91 Cong. Rec. 10168; see H. Rep. 1162, 79th Cong., 1st sess.).

S. 920 passed the Senate on July 17, 1946, with amendments not material here.⁶ Three days later, on July 20, the Chairman of the House Judiciary Committee moved to take up the Senate bill.⁷ S. 920 was accordingly passed by the House, and the companion House bill was laid on the table. 92 Cong. Rec. 9570.

(b) In the Senate report on the bill, it was noted that "on the basis of 284 judgeships * * * the additional annual gross expenditure would be \$1,420,000" (S. Rep. 1631, *supra*, at p. 2). Similarly, the House report indicated that 284 judgeships would be involved, listing them (H. Rep. 1162, *supra*, p. 12, n. 31). The figure of 284 covered only the active judges, and did not include the retired judges. Indeed, the House report, after listing the judgeships involved,⁸ goes on to state specifically that (p. 12, n. 31):

Retired and resigned judges will not receive the proposed salary increase. The statutes provide that such judges shall receive the salary payable at the time of retirement or resignation. (28 U. S. C. secs. 375, 375a, 375d (1940)).

⁶ The judges of the Tax Court and the judge of the District Court of the Virgin Islands were included in the measure under amendments offered on the floor. 92 Cong. Rec. 9188.

⁷ He had earlier, on July 18, failed to obtain consent for immediate consideration of the Senate bill. 92 Cong. Rec. 9388.

⁸ It is significant that this Report, filed on October 29, 1945, lists "Nine Justices of the Supreme Court." P. 12, n. 31. As of that time there were three retired Justices, Hughes, C. J., McReynolds and Roberts, JJ., in addition to the nine sitting Justices.

(c) It is perfectly obvious that S. 920 and H. R. 2181 were the same legislative proposal. They were *in haec verba*, the discussion in the House shows that the members considered the two bills to be the same (92 Cong. Rec. 9571, 9572), and the index to the Congressional Record, under "History of Bills and Resolutions", confirms the general understanding that S. 920 passed the House "in lieu of" H. R. 2181. That being so, it is difficult to follow the insistence in the dissenting opinion and in the petitions (A. Pet. 7; B. Pet. 14-15) that the court below was not justified in looking to the House Report on the companion bill.

It is a commonplace that this Court will look to the legislative history of other bills in order to ascertain the meaning of the enactment before them.⁹ "When aid to construction of the meanings of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States v. American Trucking Ass'ns*, 310 U. S. 534, 543-544. "The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction." *United States v. Dickerson*, 310 U. S. 554, 562. To contend, as petitioners do, that a court may

⁹ E. g., *United States v. Missouri Pacific Ry. Co.*, 278 U. S. 269, 278, 279; *American Stevedores v. Porello*, No. 69, Oct. T. 1946, decided March 10, 1947, pp. 3-6 of slip opinion.

not look to the committee report on an identical bill simply because of the legislative accident that the companion bill in the other house was the one finally enacted into law, is to espouse a contention that is wholly unrealistic and in consequence utterly untenable.¹⁰

CONCLUSION

The decision below is clearly correct, there is no conflict with any applicable decision of this Court, and the question does not warrant further review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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AUGUST 1947.

¹⁰ It may well be, as the dissenting judge says (A. R. 12; B. R. 10), that "The Act was largely a cost of living increase in salary, and the need of the retired judges for the increase was the same as that of the active judges." But those are considerations to be addressed to the Congress.

APPENDIX A

STATUTES INVOLVED

1. The Act of July 31, 1946, Pub. Law 567, c. 704, 79th Cong., 2nd sess., provides:

SEC. 1. The following salaries shall be paid to the several judges hereinafter mentioned in lieu of the salaries now provided by law, namely:

To the Chief Justice of the United States at the rate of \$25,500 per year.

To each of the Associate Justices of the Supreme Court of the United States at the rate of \$25,000 per year.

To each of the judges of the several circuit courts of appeals, including the chief justice and the associate justices of the United States Court of Appeals for the District of Columbia, at the rate of \$17,500 per year.

To the presiding judge of the United States Court of Customs and Patent Appeals, and to each of the associate judges thereof, at the rate of \$17,500 per year.

To the chief justice of the Court of Claims, and to each of the judges thereof, at the rate of \$17,500 per year.

To each of the judges of the several district courts, including the associate justices of the District Court of the United States for the District of Columbia and the judges in Puerto Rico, Hawaii, the Virgin Islands, and Alaska exercising Federal Jurisdiction, at the rate of \$15,000 per year.

To the chief justice of the District Court of the United States for the District of Columbia at the rate of \$15,500 per year.

To each of the judges of the United

States Customs Court at the rate of \$15,000 per year.

To each of the Judges of The Tax Court of the United States at the rate of \$15,000 per year.

That all of said salaries shall be paid in monthly installments.

SEC. 2. It is authorized that there be appropriated annually such sums as are necessary to carry out the provisions of this Act.

2. The Act of December 13, 1926, c. 6, 44 Stat. 919, provides:

SEC. 1. The following salaries shall be paid to the several judges hereinafter mentioned in lieu of the salaries now provided by law, namely:

To the Chief Justice of the Supreme Court of the United States the sum of \$20,500 per year, and to each of the Associate Justices thereof the sum of \$20,000 per year.

To each of the circuit judges the sum of \$12,500 per year.

To each of the district judges the sum of \$10,000 per year.

To the presiding judge of the United States Court of Customs Appeals, and to each of the other judges thereof, the sum of \$12,500 per year.

To the Chief Justice of the Court of Appeals of the District of Columbia, and to each of the associate justices thereof, the sum of \$12,500 per year.

To the Chief Justice of the Court of Claims, and to each of the other judges thereof, the sum of \$12,500 per year.

To the Chief Justice of the Supreme Court of the District of Columbia, \$10,500 per year, and to each of the associate

justices thereof the sum of \$10,000 per year.

To each of the members of the Board of General Appraisers, which board functions as the customs trial court, the sum of \$10,000 per year.

That all of said salaries shall be paid in monthly installments.

Sec. 2. This Act shall take effect on the first day of the first month next following its approval.

3. The Act of February 11, 1938, c. 23, 52 Stat. 28 (28 U. S. C. 402) provides:

No provision of law requiring any judge of any court of the United States to reside in any district or circuit shall be held or considered to apply to any such judge after he shall have retired.

4. Section 1 of the Judicial Code, 28 U. S. C. 1, provides in part:

In each of the districts described in chapter five of this title there shall be a court called a district court, for which there shall be appointed one judge, to be called a district judge, except that in * * * the District of Montana * * * there shall be an additional district judge * * *; * * * in the Southern District of Florida, * * * there shall be two additional judges * * *.

Every district judge shall reside in the district or one of the districts for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor.

5. Section 2 of the Judicial Code, 28 U. S. C. 5, provides:

Each of the district judges, including the judges in Puerto Rico, Hawaii, and Alaska exercising Federal jurisdiction, shall receive a salary of \$10,000 a year, to be paid in monthly installments.

6. Section 118 of the Judicial Code, 28 U. S. C. 213, provides in part:

There shall be in the first and fourth circuits, respectively, three circuit judges; in the tenth circuit, four circuit judges; in the third, fifth, and seventh circuits, respectively, five circuit judges; in the second and sixth circuits, respectively, six circuit judges; and in the eighth and ninth circuits, respectively, seven circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. Each circuit judge shall receive a salary of \$12,500 a year, payable monthly. Each circuit judge shall reside within his circuit, and when appointed shall be a resident of the circuit for which he is appointed.

7. Section 120 of the Judicial Code, 28 U. S. C. 216, provides in part:

The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits.

8. Section 215 of the Judicial Code, 28 U. S. C. 321, provides:

The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight Associate Justices, any six of whom shall constitute a quorum.

9. Section 260 of the Judicial Code, as amended, 28 U. S. C. 375, Supp. V, provides in part:

When any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. But, instead of resigning, any judge other than a Justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge or judicial council of that circuit and be by such senior circuit judge or such council authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to undertake or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake. Any judge who has heretofore retired, or who hereafter retires, under the provisions of this section, may perform judicial duties only when so called and

authorized as herein provided, or as provided by section 17-20, 22, and 23 of this title.

* * * * *

Upon the death, resignation, or retirement of any circuit or district judge, so entitled to resign, following the appointment of any additional judge as provided in this section, the vacancy caused by such death, resignation, or retirement of the said judge so entitled to resign shall not be filled.

10. 28 U. S. C. 375a provides:

Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retiring, instead of resigning, granted to judges other than Justices of the Supreme Court by section 375 of this title, and the President shall be authorized to appoint a successor to any such Justice of the Supreme Court so retiring from regular active service on the bench, but such Justice of the Supreme Court so retired may nevertheless be called upon by the Chief Justice and be by him authorized to perform such judicial duties, in any judicial circuit, including those of a circuit justice in such circuit, as such retired Justice may be willing to undertake. The term "judicial circuit" as used in this section includes the District of Columbia.

APPENDIX B

CORRESPONDENCE RELATING TO SALARIES OF RETIRED
JUDGES AFTER THE 1926 INCREASEUNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SIXTH CIRCUIT

Michigan, Ohio, Kentucky, Tennessee

Circuit Judges:

Arthur C. Denison—Grand Rapids, Mich.

Maurice H. Donahue—Columbus, Ohio.

Charles H. Moorman—Louisville, Ky.

CHAMBERS OF JUDGE DENISON,
*Grand Rapids, Mich., October 22, 1927.*Honorable JOHN MARSHALL,
Assistant Attorney General,
Washington, D. C.

DEAR MR. MARSHALL: I duly received yours of the 7th, giving me the list which I had requested of "resigned and retired judges" and I thank you for the trouble in getting it up.

I find two inaccuracies with reference to the distinction between the judges who have resigned and those who have retired. It seems that Circuit Judge Ward retired under amended provisions in June, 1921; but in 1924 he resigned and has not since then done any judicial work nor been eligible. District Judge Sater did not retire but absolutely resigned in November, 1924, and has since done no judicial work. In fact, he is in active practice before our court and other courts. This leaves among those judges who had retired before January 1st, 1927 and

so are not receiving the advance in salary, Circuit Judges Knappen, Ross and Morrow and District Judge Hale. For your information and in connection with a matter which I wish to bring up in the most effective way, I add the following data:

Judge Knappen, age 73, retired Apr., 1924, after having served 18 yrs.

Judge Hale, age 79, retired Jan., 1922, after having served 19 yrs.

Judge Morrow, age 84, retired Jan., 1923, after having served 31 yrs.

Judge Ross, age 82, retired May, 1925, after having served 40 yrs.

I know that Judge Knappen has continued quite actively at work ever since his retirement and has sat with us in the Court of Appeals at nearly every one of the monthly sessions during the three years, although in about half as many cases as the rest of us. I have understood that Judge Hale has done a substantial amount of work every year; I do not know how much. I have no personal knowledge as to Judges Morrow and Ross.

The Chief Justice expressed a willingness, or indeed desire, to present to Congress in the proper way, a request that Judge Knappen's retirement salary be put at the same figure it would be if he had held on a little longer. The Chief Justice assumed that Judge Hale would be in the same class; and whether he would think it wise to make a special request for these two or include all four, I do not know. I am sending him the data with the suggestion that it may

be advisable to submit a supplementary estimate for the Budget approval before it is too late. If he should make inquiries from the Department, you will understand the situation as well as I can state it.

Sincerely,

(S) A. C. DENISON,
Circuit Judge.

DEPARTMENT OF JUSTICE
Washington, D. C.

Assistant Attorney General

NOVEMBER 1, 1927.

Honorable A. C. DENISON,
United States Circuit Judge,
Grand Rapids, Michigan.

MY DEAR JUDGE DENISON: Permit me to acknowledge your valued favor of October 22, 1927, in which you suggest the propriety of the Attorney General submitting a supplemental estimate to the Bureau of the Budget, providing for an increase in the salaries drawn by retired Judges Knappen, Hale, Morrow and Ross.

I have carefully looked into the matter, and it is my opinion that it will be necessary to secure new legislation before the Attorney General could with propriety submit an estimate to the Bureau of the Budget for the purpose you have suggested. Section 375 of Title 28, of the U. S. Code, provides for the retirement of a judge "upon the salary of which he is then in receipt."

The Judges to whom you refer were retired under the terms, of course, of this Act. I am sure that you will at once see that Congress must amend the Act before it can appropriate the money; unless the necessary legislation is included in the Appropriation Act itself, which is always subject to a point of order on the floor of the House.

I remain, my dear Judge, with high esteem,
Very truly yours,

JOHN MARSHALL.

UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SIXTH CIRCUIT

Michigan, Ohio, Kentucky, Tennessee

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Arthur C. Denison—Grand Rapids, Mich.

Maurice H. Donahue—Columbus, Ohio

Charles H. Moorman—Louisville, Ky.

CHAMBERS OF JUDGE DENISON,
Grand Rapids, Mich., November 4, 1927.

Hon. JOHN MARSHALL,

Assistant Attorney General,

Washington, D. C.

MY DEAR MR. MARSHALL: I have yours of November 1st regarding my suggestion for an increase in the retirement salaries for one or two of the retired judges.

I appreciate that new legislation will be necessary but I knew that this was very often inserted in the appropriation bill itself.

It is clear enough upon your statement of it

that the Department cannot submit an estimate based upon nonexistent legislation, and hence that there is no present occasion to trouble the Department about it.

I shall hope to take it up with the Judiciary Committee and get something under way.

Sincerely,

(S) A. C. DENISON,
Circuit Judge.